Supreme Court, U.S.
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No. 05-561

In The

Supreme Court of the United States

JOSEPH TOCCI,

Petitioner,

v.

FORT WAYNE – ALLEN COUNTY AIRPORT AUTHORITY, CITY OF FORT WAYNE and ALLEN COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. TOCCI, JR.
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Pro se

QUESTIONS PRESENTED FOR REVIEW

Under the United States Constitution, may a state constitutional challenge be denied a ruling:

1) on the basis of time constraints such as statutes of limitation or laches,

2) by operation of another statute, and

3) when doing so may perfect a statutory taking of real property.

Under the United States Constitution, may a state legislature move land title from one municipality to another without:

1) doing so explicitly,

2) the approval of the original municipality by conveyance of a deed, and

3) just compensation.

PARTIES TO THE PROCEEDING

The parties in the proceeding are:

Fort Wayne – Allen County Airport Authority, a municipal corporation.

City of Fort Wayne, a municipal corporation.

County of Allen, a municipal corporation.

SMDfund, a public interest advocacy for Smith Field Airport.

Joseph Tocci, Chairman of SMDfund.

Scott W. Noble, Treasurer of SMDfund.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
ARGUMENT	6
A. The Indiana Supreme Court's Decision Violates The Redress Of Grievances Clause Of The First Amendment	6
B. The Indiana Supreme Court's Decision Violates The Privileges And Immunities, Due Process And Equal Protections Clauses Of The Fourteenth Amendment	10
C. The Indiana Supreme Court's Decision Violates Article IV, Section IV, Form Of Government Clause	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Marbury v. Madison, (1 Cranch) 5 U.S. 137 (1803)..... 6, 10

Municipal City of South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003) 4, 9

INDIANA CONSTITUTIONAL PROVISIONS:

IC 8-22-3 ..... 4, 9, 13, 19

IC 8-22-3-1.1 ..... 4, 9

IC 8-22-3-33 11

IC 34-11-1-2(a) 5

STATUTES:

28 U.S.C. § 1257(a) 1

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Indiana Supreme Court filed on August 2, 2005 is reproduced in the Appendix at App. 1. The order and judgment of the Allen Circuit Court filed March 31, 2004, is reproduced in the Appendix at App. 14.

BASIS FOR SUPREME COURT JURISDICTION

The Indiana Supreme Court entered its judgment on August 2, 2005. Appendix A-1. Petitioner SMDfund, Inc. seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of a state supreme court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States:

Amendment I, Redress of Grievances Clause

Amendment XIV, Section 1, Privileges and Immunities, Due Process and Equal Protections Clauses.

Article IV, Section 4, Form of Government Clause

Constitution of Indiana:

Article I, Section 1, Reformation Clause, Section 23. Equal Protections Clause

Article IV, Section 23, Generalized Law Clause, Uniform Operation Clause

STATEMENT OF THE CASE

This case is not so much about the legal treatment delivered in our two-year judicial hide&seek game as much as it is about the scars gathered in the five-year siege saving an operating national historic airfield from demolition. It is not about persuading public officials to recognize value as much as it is about persuading ourselves that our local officials couldn't care less about our opinions and would never tell us the truth about what they value. It was about discovering that while in America, we can reform our government without spilling a lot of blood, someone is definitely going to spill a lot of money; and that a government tax subsidized budget crushes that of a grass roots public interest advocacy where the local newspaper is part of the WhatsInItForMe club.

Smith Field is the publicly owned general aviation (GA) airport in Fort Wayne, Indiana. It is the only public access GA airfield in Allen County. It consists of ~240 contiguous acres within the boundaries of Indiana's second largest city and within ½ mile of two interchanges to U.S. Interstate 69 and with prominent frontage on the most active retail development zone in the city. The airport was commissioned by the City of Fort Wayne in June 1925, five years before the explosive development of municipal airports, and was managed by the city's Aviation Commission under the direction of the mayor and subject to normal departmental oversight by the City Council. It is listed on the Indiana Registry of Historic Places and everything within the current fence line is listed in the United States Registry of Historic Places. Its operating subsidy represents less than 1% of Respondent's total budget of $20M, or $120,000 per annum.

It served as one of America's original airmail stops and the only civilian commercial airport in the region until 1946, when the City of Fort Wayne acquired the recently (1946) de-militarized Lt. Paul Baer Army Airfeld, moved scheduled airline service there and Smith Field stood down to general aviation. The big airport then received the full attention of the City's Aviation Commission and the Authority, while their maintenance of the little airport steadily declined until the filing of this lawsuit in 2003.

Smith Field survived at least three formal attempts by local government to close it – 1974, 1978 and 1990, before this one in 2002. They never succeeded until the last, when it was controlled by a sovereign board of appointed directors, or special district, rather than by the former city commission answerable to an elected mayor and nine city councilmen.

Fort Wayne-Allen County Airport Authority (*Respondent*, the Authority), a special district of Indiana government, was 'created' in 1985, over the protest of the predecessor City of Fort Wayne, by an act of the Indiana Legislature adding Section 1.1, among others (the Law), to IC 8-22-3 such that any county with a bracketed population of 300,000-400,000 was declared to have aviation governance in the form of a co-terminus Airport Authority possessing sovereign powers. Among them are the statutory powers to legislate, to tax, to bond, to take ground by eminent domain and to overrule local zoning authorities. Allen County is the only county that has ever satisfied the population criteria. The Authority is the federally recognized sponsor of Fort Wayne International Airport (kFWA) and Smith Field (kSMD). Its Board of Directors consists of six unpaid and appointed volunteers; three by the Mayor and three by the County Commissioners in staggered

terms. They are subject to City and County Councils' budgetary review but there is no record of it having ever been reviewed by either. Approximately 20% of their budget is funded by county property taxes.

The Authority recorded affidavits with the County Recorder claiming to have received title to the airports by the operation of the Law. We disagree. Moreover, Article IV, Section 23 of the Indiana Constitution prohibits legislation that does not operate uniformly throughout the state where it can be written to apply generally. We believe that IC 8-22-3-1.1 violates this prohibition in the Indiana Constitution.

The prime advocates involved in saving Smith Field since 2000, had little knowledge of the particular legal attributes of the Authority's establishment in 1985. It was not until February 2003, six months after the closure decision had been adopted by the Authority, that the Journal Gazette published an extensive cover story in the Sunday paper and we read a comprehensive report on the Indiana Supreme Court's recent ruling in *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003). SMDfund had just formally organized two days earlier with a plan to challenge the Authority's 2001 affidavits claiming title to lands under both airports. The *Kimsey* ruling changed everything.

Four days later, SMDfund filed a suit in Allen Circuit Court claiming: 1) unconstitutional 1985 enactment of Section 1.1 of IC 8-22-3 establishment of the Authority and 2) the Authority's claim of lawful transfer of title without benefit of deeds is ineffective.

The trial court indulged ad seriatim motions for dismissal until ruling that the general statute of limitations contained in IC 34-11-1-2(a) bars facial constitutional challenges after ten years. SMDfund gave notice of intention to appeal. The Authority then petitioned the Indiana Supreme Court for an emergency transfer. SMDfund agreed for other reasons and the Court heard oral argument on 30 October 2004. SMDfund argued that the complaint was a public interest complaint involving a violation of the Indiana Constitution and therefore could not be barred by any time constraint. On 2 August 2005, the Court unanimously affirmed dismissal based on the doctrine of laches. We believe this result stunningly defiant of any reasonable purpose for the Redress of Grievances Clause of the First Amendment to the United States Constitution.

Joe Tocci, petitioner pro se, asks that this Court grant its petition for a writ of certiorari to conform the Court's decision to existing Supreme Court authority, to harmonize the Indiana Court's result with the civil protections enumerated in the Constitution and to correct a result that, if left undisturbed, preserves a perpetual threat to this national historic treasure, establishes a precedent supporting takings without due process and thoroughly chills the hope of ordinary citizens from similar American communities to obtain judicial remedy to arbitrary rule by the executive and legislative branches of our governments.

ARGUMENT

A. The Indiana Supreme Court's Decision Violates The Redress Of Grievances Clause Of The First Amendment

Especially in a public interest dispute, an American court refusing to hear a constitutional grievance, faithfully brought, denies Plaintiff peaceable redress of grievances. George Washington said, "*Government is not reason. It is not eloquence. It is force.*" To deny redress is to allow this government to force its will over that of the people.

1. Balancing the Legislature's Prerogatives Against Constitutional Imperative. To allow a law to stand immune to constitutional muster is to immunize an alleged corruption and threatens the peoples' trust in the rule of law over the natural capacity of their lawmakers to dilute the rights that are otherwise protected by those constitutional constraints. To do so habitually is to unavoidably destroy that trust upon which a peaceable society must rely.

Justice Marshall, in *Marbury v. Madison*, (1 Cranch) 5 U.S. 137 (1803), wrote " *. . . the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that [either] the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.*

Between these alternatives there is no middle ground. The constitution is either a superior paramount law,

unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further considerations of this subject."

It is the position of the Court that repugnancy is absolute and is, by definition, incompatible with the rule of law.

2. Immunity to Review. But is a court obliged to rule on the question?

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it may be not law, does it constitute a rule as operative as if it was a law? . . .